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OCTOBER TERM, 1978

No. 78-1617

BAY MEDICAL CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

The American Hospital Association (hereafter "AHA")[2] files this brief *amicus curiae* to present its views in a case of great importance in the application of the National Labor Relations

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1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

2. The AHA is a non-profit Association of more than 6,500 member institutions engaged in the delivery of health care. It is the largest association of health care institutions of its kind in the United States.

Act to the newly-covered health care industry.[3] The question presented in this case is the extent to which the National Labor Relations Board (hereinafter "the Board") may disregard Congressional intent by certifying hospital bargaining units based upon its own policy interpretations that prior bargaining history should control such unit determinations.

AHA has been involved in the instant case subsequent to the Board's determination that a unit of technical employees separate and apart from licensed practical nurses was appropriate at Bay Medical Center. The Board's decision was based solely upon the existence of prior bargaining history in a small unit of licensed practical nurses and ignored the Congressional intent to prevent proliferation of bargaining units in a health care institution.[4] This decision was appealed by the Medical Center to the U. S. Court of Appeals for the Sixth Circuit. AHA filed a brief *amicus curiae* and participated in oral argument.

AHA joined the Petitioner before the Sixth Circuit in asserting that the Board's determination was erroneous in two critical respects: (1) the certification of a separate unit of technical employees which failed to include licensed practical nurses was in conflict with the Congressional intent and legislative history of the 1974 amendments; and (2) the unit determination was in conflict with the Board's own guideline decisions[5] and prior rulings with respect to the importance of bargaining history.[6]

The Sixth Circuit upheld the Board's determination but failed to adequately address the inconsistencies of the Board's guideline decisions with its decision in this case; as well as the Board's failure to comply with Congressional intent. This case provides the first opportunity for this Court to address the issue of the

3. In 1974, Congress enacted Public Law 93-360 (S. 3203) which amended the Taft-Hartley Act to bring voluntary non-profit health care institutions under the federal law.

4. *Bay Medical Center,* 218 NLRB 620 (1975).

5. See pp. 6-8 and note 15, *infra.*

6. See p. 7, *infra.*

appropriateness of separate, proliferated units *vis a vis* the Congressional intent and legislative history of the 1974 Health Care Amendments.

I.

THE SIXTH CIRCUIT'S DECISION FAILED TO ACCORD PROPER AUTHORITY TO THE CONGRESSIONAL ADMONITION TO PREVENT BARGAINING UNIT PROLIFERATION IN THE HEALTH CARE INDUSTRY.

In its decision below[7] the Court of Appeals for the Sixth Circuit concluded that the Board's determination[8] not to include LPN's in a bargaining unit of technical employees was correct. The Court held that the Board's determination "was a considered decision in which the Board balanced the policy against undue proliferation of bargaining units[9] with the policy against disrupting existing bargaining relationships."[10] AHA submits that neither the Board nor the Court properly considered the importance of the Congressional admonition in the 1974 Health Care Amendments[11] to prevent unit proliferation.

7. *Bay Medical Center* v. *NLRB,* ..... F. 2d ....., No. 76-1881 (December 28, 1978).

8. 218 NLRB 620 (1975).

9. "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decision in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

1. By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision."

"Legislative History of the Coverage of Nonprofit Hospitals Under The National Labor Relations Act, 1974" (hereinafter Legis. Hist.) S. Rep. No. 93-766 (1974) 93d Cong., 2d Sess. 5 at 12; H. Rep. No. 93-1501, 93d Cong., 2d Sess. 6-7 (1974) at 274-275.

10. *Bay Medical Center* v. *NLRB, supra.*

11. Pub. L. 93-360 (S. 3203) August 25, 1974.

With respect to bargaining units that were in existence prior to the federal law, Congress provided clear intent to displace these relationships which were in conflict with the Health Care Amendments and which had arisen under state law.

Thus, during Congress' consideration of the Health Care Amendments, legislators were confronted with the effect of passage of the uniform federal Act upon hospital bargaining units in existence under state law. The legislative history demonstrates Congress' intent, as follows:

> "MR. QUIE. Mr. Speaker, if the gentlemen will yield further, what is the application of the legislation on hospitals and unions *presently engaged in bargaining under State laws,* or even where no law, State or Federal, had previously applied to them?
>
> "MR. THOMPSON of New Jersey. To attempt to answer your questions, it seems *that those hospitals presently engaged in bargaining will have to meet the requirements of the National Labor Relations Act when this legislation becomes effective.* For instance, had a hospital recognized a minority union, it is contemplated that the hospital could no longer continue recognition. It would seem the better practice that if either party questioned the validity of the recognition or the appropriate unit, they should file a representation petition with the NLRB."[12] (Emphasis supplied.)

As a consequence, Congressional concern regarding preexisting bargaining units and their appropriateness under the uniform federal Act, necessitates the conclusion that where such units are found to be inappropriate, they would have to be redetermined by the Board. Specifically, the Board would be required to consider appropriateness of hospital bargaining units in light of the Congressional admonition to prevent unit proliferation. Thus, before a redetermined unit is to be classified as appropriate, the Board must find that such determination

12. 120 Cong. Rec. H6393 (daily ed. July 11, 1974).

does *not* cause a proliferation of bargaining units.[13] The Board failed to do this in deciding that a divided unit of technical employees, separate and apart from licensed practical nurses, was appropriate in this case.

AHA submits, that it is this crucial fact which the Board in the first instance, and the Sixth Circuit on review, failed to consider in rendering their decisions. As a result of the particular attention focused on the health care industry in considering these amendments, Congress felt compelled to admonish the Board to *prevent* unit proliferation. In no other industry has the Congress exhibited such special concern or provided such a specific directive. This admonition, by definition, inherently conflicts with recognized Board policy to preserve prior bargaining relationships *which was developed for other industries;* particularly where such existing relationships constitute unit proliferation. Congress' paramount concern was to have the Board prevent small units and many units in health care institutions.

However, both the Board and the Court misplaced their emphasis on the "stability of a prior bargaining relationship", rather than on the Congressional admonition to prevent proliferation. In other industries where there is no such inherent

13. It is important to consider the remarks of Senator Taft, co-manager of S. 3203 commenting upon the necessity for avoiding unit proliferation in hospitals.

> "*Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care . . . [I] cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented. . . [T]he administration problems from a practical operation viewpoint and labor-relation viewpoint must be considered by the Board on this issue.* Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard." 120 Cong. Rec. § S6940-1 (daily ed. May 2, 1974) (emphasis added)

conflict, the Board's determination to preserve prior bargaining relationships may well be properly balanced against other competing interests. But in the health care industry application of such policy cannot help but foster proliferation, and as such, vitiate the Congressional intent.

II.

THE BOARD'S RELIANCE ON PRIOR BARGAINING HISTORY MANIFESTLY DISREGARDS THE BOARD'S OWN GUIDELINE DECISIONS AND CONSTITUTES AN ABUSE OF ITS STATUTORY DUTY UNDER THE ACT.

In order to meet its responsibilities and carry out Congress' desire for a uniform, national policy, we submit that the Board should be required to carefully review bargaining unit relationships which pre-date the Act. Upon their review, where an existing bargaining unit contravenes Congressional intent, or the Board's own guidelines, the Board should be called upon to revise the composition of that unit.

This, however, is precisely what the Board failed to do in the instant case. The Board instead relied upon past bargaining history as the controlling factor[14] to determine that a unit of all technical employees at Bay Medical Center, Inc., excluding licensed practical nurses was appropriate; a direct departure from the Board's own guideline decisions holding that technical units shall include licensed practical nurses.[15]

14. "In the instant case, *the record indicates an established bargaining history among the LPN's at General* who are currently represented for collective-bargaining purposes by Intervenor MLPNA, which has a contract with the Employer that will not expire until February 1, 1977. *We do not desire to upset the stability inherent in that bargaining relationship by disenfranchising the LPN's at General and including them in the above technical unit. Nor do we think it proper to include the above technical unit the LPN's at Mercy who are currently unrepresented.*" (A. 18-19) (emphasis added).

15. *Barnert Memorial Hospital Center,* 217 NLRB No. 132 (1975); *St. Catherine's Hospital of Dominican Sisters of Kenosha,*

(Footnote continued on next page.)

Not only did the Board fail to carefully analyze the facts herein in light of its guideline *Barnert* and *St. Catherine's* decisions, but of parallel significance, the decision herein does not even comport with the Board decisions with respect to bargaining history. Thus, in *North Memorial Medical Center,* 224 NLRB No. 28 (1976), the Board, when presented with facts similar to the instant case, dismissed a petition for a unit of emergency medical technicians who had a 14-year bargaining history. The Board stated:

> "The Regional Director's reliance on the bargaining history to support his contrary finding is misplaced. For while bargaining history is relevant in determining the appropriateness of a unit, it is not the sole factor. Under the circumstances herein, we find it is not controlling.
>
> We note at the outset that the bargaining history in this case took place under the Minnesota statute which permitted the formulation of fragmented units such as the one sought herein. This is in sharp contrast with the principal thrust of the legislative history of the health care amendments of the Act, admonishing the Board to avoid undue proliferation of bargaining units in the health care industry." 224 NLRB No. 28.

(Footnote continued from preceding page.)

Wisconsin, Inc., 217 NLRB No. 133 (1975); *Duke University,* 217 NLRB No. 136 (1975); *Mercy Hospitals of Sacramento, Inc.,* 217 NLRB No. 131 (1975); *Mount Airy Foundation,* 217 NLRB No. 137 (1975); *Newington Children's Hospital,* 217 NLRB No. 134 (1975); *Shriners Hospital for Crippled Children,* 217 NLRB No. 138 (1975); *Sisters of St. Joseph's of Peace,* 217 NLRB No. 135 (1975). In these guideline health care industry bargaining unit decisions the Board determined five basically appropriate units, as follows:

1. Technical employees, including licensed practical nurses, *Barnert, supra; St. Catherine's, supra.*
2. All other professionals, *Mercy Hospitals, supra.*
3. Service and maintenance employees, *Newington, supra, Duke University, supra; Mount Airy, supra; Shriners, supra.*
4. Registered nurses, *Mercy Hospitals, supra.*
5. Business office clerical employees, *Mercy Hospitals, supra; Sisters of St. Joseph, supra.*

Nowhere in the instant decision does the Board articulate a similar consideration of the congressional concern. Thus, the Board's *North Memorial* decision and the instant case are in diametric opposition, without any explanation of the reasons why this is so. The Board only concludes herein that "we do not desire to upset the stability inherent in that bargaining relationship" by including the LPN's in the technical unit (A. 19). It is clear that it is this kind of "substitution of a conclusion for explanation [which] does not permit a reviewing Court to do its job." *Peerless of America, Inc.* v. *N. L. R. B.*, 484 F. 2d 1108, 1119 (7th Cir., 1973); *The Atchison, Topeka and Santa Fe R. R. Co.* v. *The Wichita Board of Trade*, 412 U. S. 800, 41 L. W. 4905, 4911 (1973). The Board has neither properly disclosed the basis of its Order herein nor provided clear indication that it has even exercised its discretion. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965). Such a conclusory statement without articulation of its reasons or distinction among other Board decisions is insufficient to meet the requirements of the Act.

In referring to the statutory duty of the National Labor Relations Board under § 9(b) of the Act, the Third Circuit Court of Appeals stated in *Memorial Hospital of Roxborough* v. *NLRB*, 545 F. 2d 351 (1976):

> "This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 24-27 (1948). Here, however, the Board abdicated its required duty by accepting the PLRB determination without exercising its own mandated discretion." *Memorial Hospital of Roxborough* v. *National Labor Relations Board, supra*, at 93 LRRM 2577.

And in holding that the Board "abdicated its required duty" by applying its comity doctrine to the state board's bargaining unit decision, the Court wrote:

> "in granting comity to the unit determination of the PLRB the Board has neither exercised the discretion that Congress mandated be exercised in § 9(b) of the NLRA nor complied with the Congressional admonition that it consider proliferation of units in the health care industry. As we have said, the Board's action here thus overstepped the law, the national labor policy, and Congress' indicated intent with respect to health care institutions." *Memorial Hospital* v. *NLRB, supra*, at 93 LRRM 2578.

The parallel between *Memorial Hospital of Roxborough* v. *NLRB, supra*, and this case is noteworthy. Here, the Board has again sought to abdicate its required duty; this time, however, by using bargaining history which arose under state law.

CONCLUSION

By having accorded controlling weight to prior bargaining history, the Board is undermining the goal of a uniform policy on health care industry bargaining units; it is ignoring the Congressional admonition concerning health care unit proliferation; and it is ignoring its own guideline bargaining unit decisions. In so doing, the Board's action oversteps the law, the national labor policy and Congress' indicated intent with respect to the health care institutions.

AHA submits that the Board and Court below improperly disregarded Congressional intent to prevent unit proliferation by certifying a unit consisting solely of technical employees excluding licensed practical nurses. The consequence of this action will be the sanctioning of additional exceptions to the Congressional admonition and guideline decisions, thereby fostering the proliferation of bargaining units.

For all of the above reasons, as well as for the reasons set forth by the Petitioner in its brief, AHA respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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